

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CASE MANAGEMENT TRACK DESIGNATION FORM

Calhoun : CIVIL ACTION

v. : NO. 19

2533

Commonwealth of Pennsylvania, et. al.

In accordance with the Civil Justice Expense and Delay Reduction Plan of this court, counsel for plaintiff shall complete a Case Management Track Designation Form in all civil cases at the time of filing the complaint and serve a copy on all defendants. (See § 1:03 of the plan set forth on the reverse side of this form.) In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a Case Management Track Designation Form specifying the track to which that defendant believes the case should be assigned.

SELECT ONE OF THE FOLLOWING CASE MANAGEMENT TRACKS:

(a) Habeas Corpus – Cases brought under 28 U.S.C. § 2241 through § 2255. 2254 ()

(b) Social Security – Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security Benefits. ()

(c) Arbitration – Cases required to be designated for arbitration under Local Civil Rule 53.2. ()

(d) Asbestos – Cases involving claims for personal injury or property damage from exposure to asbestos. ()

(e) Special Management – Cases that do not fall into tracks (a) through (d) that are commonly referred to as complex and that need special or intense management by the court. (See reverse side of this form for a detailed explanation of special management cases. ())

(f) Standard Management – Cases that do not fall into any one of the other tracks. ()

JUN 10 2019

Date

Andrea M. G.

Deputy Clerk

Attorney for

Telephone

FAX Number

E-Mail Address

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

19 2533

DESIGNATION FORM

(to be used by counsel or pro se plaintiff to indicate the category of the case for the purpose of assignment to the appropriate calendar)

Address of Plaintiff: _____ PO Box 562, Philadelphia, PA 19106

Address of Defendant: _____

Place of Accident, Incident or Transaction: _____ Philadelphia

RELATED CASE, IF ANY:

Case Number: 09 - 1707 Judge: D. Bois Date Terminated: 7/27/10Civil cases are deemed related when **Yes** is answered to any of the following questions:

1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action of this court?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
4. Is this case a second or successive habeas corpus, social security appeal, or pro se civil rights case filed by the same individual?	Yes <input type="checkbox"/>	No <input type="checkbox"/>

I certify that, to my knowledge, the within case is / is not related to any case now pending or within one year previously terminated action in this court except as noted above.DATE: 06/10/2019Dal Mard

Attorney-at-Law / Pro Se Plaintiff

Attorney I.D. # (if applicable)

CIVIL: (Place a ✓ in one category only)

A. Federal Question Cases:

- 1. Indemnity Contract, Marine Contract, and All Other Contracts
- 2. FELA
- 3. Jones Act-Personal Injury
- 4. Antitrust
- 5. Patent
- 6. Labor-Management Relations
- 7. Civil Rights
- 8. Habeas Corpus 2254
- 9. Securities Act(s) Cases
- 10. Social Security Review Cases
- 11. All other Federal Question Cases
(Please specify): _____

B. Diversity Jurisdiction Cases:

- 1. Insurance Contract and Other Contracts
- 2. Airplane Personal Injury
- 3. Assault, Defamation
- 4. Marine Personal Injury
- 5. Motor Vehicle Personal Injury
- 6. Other Personal Injury (Please specify): _____
- 7. Products Liability
- 8. Products Liability – Asbestos
- 9. All other Diversity Cases
(Please specify): _____

ARBITRATION CERTIFICATION

(The effect of this certification is to remove the case from eligibility for arbitration.)

I, _____, counsel of record or pro se plaintiff, do hereby certify:

- Pursuant to Local Civil Rule 53.2, § 3(c) (2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of \$150,000.00 exclusive of interest and costs:
- Relief other than monetary damages is sought.

DATE: _____ Attorney-at-Law / Pro Se Plaintiff Attorney I.D. # (if applicable)

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

**PROTECTIVE PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY**

United States District Court	District: Eastern District of Pennsylvania
Name (under which you were convicted): DAVID CALHOUN #59771-066	Docket or Case No.: 19 2533
Place of Confinement: FDC Philadelphia Petitioner is currently subject to PA Parole Board detainer. See Attachment	Prisoner No.: P.O. Box 562, Phila., PA 19106 #59771-066
Petitioner (Include the name under which you you were convicted): DAVID CALHOUN	Respondent (Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner): COMMONWEALTH OF PENNSYLVANIA
and V.	
The District Attorney of the County of: <u>PHILADELPHIA</u>	
and	
The Attorney General of the State of: <u>PENNSYLVANIA</u>	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

Court of Common Pleas for Philadelphia County
1301 Filbert Street, Philadelphia, PA 19107

CP-51-CR-0601371-2000 and

(b) Criminal docket or case number (if you know): CP-51-CR-0910211-2000

2. (a) Date of judgment of conviction (if you know): June 11, 2002

(b) Date of sentencing: June 11, 2002

3. Length of sentence: Three to six years

4. In this case, were you convicted on more than one count or of more than one crime? Yes No

5. Identify all crimes of which you were convicted and sentenced in this case: Two counts of possession
with intent to deliver controlled/counterfeit substance;
one count of conspiracy; and one count of possession of an
instrument of crime

6. (a) What was your plea? (Check one)

(1) Not Guilty (3) Nolo contendere (no contest)
 (2) Guilty (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? nolo contendere as to all four counts listed in part 5 above

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes No

8. Did you appeal from the judgment of conviction?

Yes No

9. If you did appeal, answer the following:

(a) Name of court: N/A N/A
 (b) Docket or case number (if you know): N/A
 (c) Result: N/A
 (d) Date of result (if you know): N/A
 (e) Citation to the case (if you know): N/A
 (f) Grounds raised: N/A

(g) Did you seek further review by a higher state court?

Yes No

If yes, answer the following:

- (1) Name of court: N/A
- (2) Docket or case number (if you know): N/A
- (3) Result: N/A
- (4) Date of result (if you know): N/A
- (5) Citation to the case (if you know): N/A
- (6) Grounds raised: N/A

(h) Did you file a petition for certiorari in the United States Supreme Court?

Yes No

If yes, answer the following:

- (1) Docket or case number (if you know): N/A
- (2) Result: N/A
- (3) Date of result (if you know): N/A
- (4) Citation to the case (if you know): N/A

(i) Other than the direct appeal listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes No

10. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Court of Common Pleas Philadelphia County
 (2) Docket or case number (if you know): same as original
 (3) Date of filing (if you know): December 28, 2005
 (4) Nature of the proceeding: PCRA -- time credit issue
 (5) Grounds raised: Petitioner requested time credit for time held in custody on the instant matter.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

 Yes No(7) Result: Motion granted --time credited(8) Date of result (if you know): December 15, 2006

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: same court as above(2) Docket or case number (if you know): same as original(3) Date of filing (if you know): September 24, 2014(4) Nature of the proceeding: Motion to Correct Trial Record & supplemental

PCRA

(5) Grounds raised: Request to correct docket & court documentsto reflect plea of nolo contendere rather than theerroneously listed disposition of "guilty plea"; supplementalPCRA was also filed to challenge voluntariness andknowing nature of entry of plea

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

 Yes No(7) Result: Motion to Correct denied and PCRA denied(8) Date of result (if you know): January 16, 2018

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: same court(2) Docket or case number (if you know): same as original(3) Date of filing (if you know): on or about December 2018(4) Nature of the proceeding: PCRA(5) Grounds raised: Commonwealth breached plea agreement byrequesting court to maintain erroneous record reflectingguilty plea disposition where the bargain which hadbeen reached by the parties was for petitioner toenter nolo contendere (not a guilty plea).

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes No

(7) Result: no disposition yet

(8) Date of result (if you know): none

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion:

(1) First petition:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
(2) Second petition:	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
(3) Third petition:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> Not yet

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

No need to appeal first petition because petitioner won.
The lower court has yet to issue a ruling to be appealed.

11. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Plea of nolo contendere was rendered involuntary/unknowingly. Commonwealth breached plea agreement upon arguing for the Court of Appeals to permit the Common Pleas Court to maintain record of "guilty plea" where parties bargained for
(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): nolo contendere. Commonwealth had offered to recommend current sentence and credit petitioner with time on house arrest in exchange for petitioner's entry of nolo contendere. The Common Pleas Court subsequently accepted the nolo contendere pursuant to said deal, but erroneously listed disposition as "guilty plea." Petitioner moved to correct but was denied by Common Pleas court. On appeal to Superior Court, Commonwealth argued to permit the Common Pleas Court to maintain an erroneous record of "guilty plea" disposition (contrary to plea agreement). As a result of Commonwealth's victory on said appeal, petitioner's nolo contendere was rendered involuntary and unknowingly. Commonwealth's breach effectively converted plea to guilty.

(b) If you did not exhaust your state remedies on Ground One, explain why: This is a protective habeas petition filed within one year of the alleged breach of plea agreement. The Court of Common Pleas has yet to rule on the corresponding PCRA petition. Petitioner requests this court to stay these proceedings pending the result of the state court proceedings.

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No --did not appeal yet

(2) If you did not raise this issue in your direct appeal, explain why? N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Post Conviction Relief motion

Name and location of the court where the motion or petition was filed: original court of conviction/sentence

Docket or case number (if you know): same as original

Date of the court's decision: none yet

Result (attach a copy of the court's opinion or order, if available): none yet

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A -- no ruling has been issued by Common Pleas court

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: none

GROUND TWO: Petitioner's entry of nolo contendere was rendered involuntary/unknowing upon state court's refusal to correct the public record to reflect nolo rather than "guilty plea" and refusal (a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim): to strike Common Pleas court accepted petitioner's plea of "guilty" nolo contendere, yet erroneously listed said plea as "guilty" and adjudicated him "guilty." The adjudication refusal of all state court's to correct said public record rendered involuntary/unknowing petitioner's plea of nolo contendere.

(b) If you did not exhaust your state remedies on Ground Two, explain why: Issue exhausted

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why? N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: PCRA

Name and location of the court where the motion or petition was filed: original court of sentence

Docket or case number (if you know): same as original

Date of the court's decision: January 16, 2018

Result (attach a copy of the court's opinion or order, if available): motion denied as untimely (reason reflected on docket listing)

(3) Did you receive a hearing on your motion or petition?

Yes No

(4) Did you appeal from the denial of your motion or petition?

Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Superior Court of PA
530 Walnut Street, Philadelphia, PA 19106

Docket or case number (if you know): 417 EDA 2018

Date of the court's decision: April 29, 2019

Result (attach a copy of the court's opinion or order, if available): Superior Court denied petitioner's appeal requesting to correct the record below and denied his PCRA (supplement). The opinion is attached as Exhibit 1.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: The issue raised in this ground was raised and decided by the Superior Court. See opinion at Exhibit 1.

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: none

GROUND THREE: none

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) If you did not exhaust your state remedies on Ground Three, explain why:

N/A

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why:

N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: _____
N/A

Docket or case number (if you know): _____ N/A

Date of the court's decision: _____ N/A

Result (attach a copy of the court's opinion or order, if available): _____
N/A

(3) Did you receive a hearing on your motion or petition? Yes No

(4) Did you appeal from the denial of your motion or petition? Yes No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____ N/A

Docket or case number (if you know): _____ N/A

Date of the court's decision: _____ N/A

Result (attach a copy of the court's opinion or order, if available): _____
N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____
N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____
N/A

GROUND FOUR: _____ none

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
N/A

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this

issue: N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

none

12. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction?

Yes No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: GROUND TWO was presented to highest state court.
GROUND ONE was not yet presented because Court of Common
Pleas has yet to rule. This is a protective habeas
petition filed to preserve petitioner's habeas rights
by filing within the one-year time limit of the AEDPA.

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

none

13. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition?

Yes No --technically petitioner never challenged the judgment challenged here. rather he only

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the challenged issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Parole Attach a copy of any court opinion or order, if available. U.S. Dist. Court for the Board rulin
Eastern Dist. of PA (this court) in Calhoun v. PA Bd. of Parole,
Case No. 09-cv-1707, 2254 habeas matter, decided on July 26, 2010.
Issues raised include various due process challenges to Board's
decision to revoke parole. Said revocation was the only judgment
challenged. ORDER appears at 2010 U.S. Dist. LEXIS 75455 and
OPINION appears at U.S. Dist. LEXIS 75289.

14. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging?

Yes No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised: N/A

15. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Guy Sciolla (address unknown)

(b) At arraignment and plea: Louis T. Savino, Two Penn Center Philadelphia

(c) At trial: Louis T. Savino, Two Penn Center, Philadelphia

(d) At sentencing: same as above

(e) On appeal: none

(f) In any post-conviction proceeding: Christopher Evarts, Atty. #61518
(address unknown)

(g) On appeal from any ruling against you in a post-conviction proceeding: none (pro se)

16. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?

Yes No

(a) If so, give the name and location of the court that imposed the other sentence you will serve in the future: N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future?

Yes No

17. **TIMELINESS OF PETITION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition*

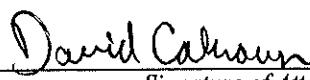
GROUND ONE is timely on grounds the breach of the plea agreement occurred in December 2018 (less than one year from the date this petition was filed). GROUND TWO is timely on grounds that an incorrect record (by itself) is normally correctable. Once the state court's refused to correct the erroneous record, the error was no longer correctable. Said immutability of the error is what had rendered petitioner's plea involuntary/unknowing. Therefore, this GROUND is timely raised because the immutability of said error did not manifest until the Superme Court of Pennsylvania denied petitioner the opportunity to appeal and said ruling occurred this year.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall run from the latest of -
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: STAY of proceedings until Petitioner exhausts issues to state's highest court and upon an adverse ruling (against petitioner) to hold a hearing as to the issues presented and upon doing so grant the writ of habeas corpus by ordering the state court to vacate Petitioner's conviction and remand for trial

or any other relief to which petitioner may be entitled.



Signature of Attorney (if any)
David Calhoun, pro se

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on May 29, 2019
(month, date, year)

Executed (signed) on May 29, 2019 (date).

David Cainoun
Signature of Petitioner
David Cainoun

If the person signing is not the petitioner, state the relationship to petitioner and explain why petitioner is not signing this petition. N/A

BP-A0394
APR 10

DETAINER ACTION LETTER

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

TO: Commonwealth of Pennsylvania Board of Probation and Parole 1101 South Front Street, Suite 5800 Harrisburg, PA 17104 Attn: H. Kerstetter		Institution FDC Philadelphia 700 Arch Street Philadelphia, PA 19106
Case/Dkt# CP000600137; CP000901021	Inmate's Name CALHOUN, David	Date 05/12/2016
Aliases CALHOUN, David Andrew		Fed. Req. No. 59771-066
		DOB/SEX/RACE 10-11-1965/M/W
		Other No. FBI #574337JC0 PA PAROLE #235CC

The below checked paragraph relates to the above named inmate:

This office is in receipt of the following report: _____
Will you please investigate this report and advise what disposition, if any, has been made of the case. If subject is wanted by your department and you wish a detainer placed, it will be necessary for you to forward a certified copy of your warrant to us along with a cover letter stating your desire to have it lodged as a detainer. If you have no further interest in subject, please forward a letter indicating so.

A detainer has been filed against this subject in your favor charging PAROLE VIOLATION _____
Release is tentatively scheduled for _____
however, we will again notify you no later than 60 days prior to actual release. To check on an inmate's location, you may call our National Locator Center at: 202-307-3126 or check our BOP Inmate Locator Website at www.bop.gov.

Enclosed is your detainer warrant. Your detainer against the above named has been removed in compliance with your request.

Your detainer warrant has been removed on the basis of the attached _____
Notify this office immediately if you do not concur with this action.

Your letter dated _____ requests notification prior to the release of the above named prisoner. Our records have been noted. Tentative release date at this time is _____

I am returning your _____ on the above named inmate who was committed to this institution on _____ to serve _____ for the offense of _____
If you wish your _____ filed as a detainer, please return it to us with a cover letter stating your desire to have it placed as a hold or indicate you have no further interest in the subject.

Other:
WILL EXTRADITE

Sincerely,



Inmate Systems Manager

Original - Addressee, Copy - Judgment & Commitment File; Copy - Inmate; Copy Central File (Section 1); Copy -
Correctional Services Department

PDF

Prescribed by P5800

(Replaces BP-394(58) dtd MAR 03)

EXHIBIT 1

OPINION OF SUPERIOR COURT DATED APRIL 29, 2019

J-A04025-19

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA : IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

DAVID A. CALHOUN,

Appellant : No. 417 EDA 2018

Appeal from the PCRA Order, January 16, 2018,
in the Court of Common Pleas of Philadelphia County,
Criminal Division at No(s): CP-51-CR-0601371-2000.

BEFORE: LAZARUS, J., KUNSELMAN, J., and COLINS,* J.

MEMORANDUM BY KUNSELMAN, J.:

FILED APRIL 29, 2019

David A. Calhoun appeals *pro se* from the order denying as untimely his serial petition filed pursuant to the Post Conviction Relief Act ("PCRA"). 42 Pa.C.S.A. §§ 9541-46. We affirm.

The PCRA court summarized the pertinent facts and procedural history as follows:

[Calhoun] was arrested and subsequently charged in connection with selling narcotics with Silvino Macasieb in Philadelphia in 2000. On June 11, 2002, [Calhoun] entered a plea of nolo contendere before the Honorable Carolyn Engel Temin to two counts of possession with intent to deliver a controlled substance, criminal conspiracy, and possession of an instrument of crime. On the same date [Calhoun] was sentenced to three to six years [of] incarceration. No direct appeal was filed.

On December 28, 2005, [Calhoun] filed his first *pro se* PCRA petition seeking credit for time served. Counsel was appointed and the PCRA court subsequently granted relief by agreement on December 15, 2006. [Calhoun] was

*Retired Senior Judge assigned to the Superior Court.

J-A04025-19

awarded credit for time served from January 31, 2000 to February 24, 2000.

On June 29, 2005, [Calhoun] was indicted in the United States District Court for the Eastern District of Pennsylvania on federal drug charges. *See United States v. Calhoun*, 2012 WL 2467010 (E.D. Pa. June 28, 2012). On April 20, 2006, following a jury trial before the Honorable Marvin Katz, the jury found [Calhoun] guilty on all counts charged. On August 11, 2006, [Calhoun] was sentenced to twenty years [of] imprisonment, followed by ten years of supervised release.

On September 14, 2014, [Calhoun] filed the instant *pro se* collateral petition, his second. [Calhoun] also submitted a supplemental PCRA petition which was reviewed jointly with his [2014] petition. Pursuant to [Pa.R.Crim.P.] 907, [Calhoun] was served notice of the PCRA court's intention to dismiss the petition on December 15, 2017. [Calhoun] submitted a response to the Rule 907 notice on December 26, 2017. On January 16, 2018, the PCRA court dismissed his PCRA petition as untimely.

PCRA Court Opinion, 4/26/18, at 1-2 (footnote omitted). This appeal followed.

The PCRA court did not require Pa.R.A.P. 1925 compliance.

Calhoun raises the following issues:

1. Are post-conviction motions that do not challenge either Calhoun's sentence or his conviction subject to the timeliness requirements of the PCRA?
2. Is Calhoun's "Motion to Correct Trial Record" not cognizable under the PCRA and therefore not subject to the PCRA's timeliness requirements?
3. Where the record reflects that Calhoun had never tendered a guilty plea, should the trial court have corrected the docket entries to reflect the correct dispositions of "nolo contendere" as opposed to allowing said fields to currently list dispositions of "Guilty Plea?"

4. Where the only disposition resulted from “*nolo contendere*” should the trial court have struck from the record that adjudication of “guilty?”

See Calhoun’s Brief at 1.

This Court’s standard of review regarding an order dismissing a petition under the PCRA is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. *Commonwealth v. Halley*, 870 A.2d 795, 799 n.2 (Pa. 2005). The PCRA court’s findings will not be disturbed unless there is no support for the findings in the certified record. *Commonwealth v. Carr*, 768 A.2d 1164, 1166 (Pa. Super. 2001).

Before addressing the merits of Ross’s substantive claims on appeal, we must first address his assertion that the PCRA court wrongfully treated his 2014 “Petition for Writ of Error Coram Nobis” under the PCRA.¹ Our Supreme Court “has consistently held that, pursuant to the plain language of Section 9542, where a claim is cognizable under the PCRA, the PCRA is the only

¹ Within his brief, Calhoun re-characterizes this petition as a “Motion to Correct Trial Record.” Although the docket sheet indicates that this is how the filing was recorded, the actual petition is one for a writ of error coram nobis. Nevertheless, Calhoun’s request to correct the record is of no significance, since Pennsylvania case law is well settled that a plea of *nolo contendere* is equivalent to and treated the same as a guilty plea in terms of its effect upon the particular case. See, e.g., *Commonwealth v. Leidig*, 956 A.2d 399, 401 (Pa. 2008).

Moreover, our review of Calhoun’s supplemental PCRA petition filed on July 26, 2017, readily indicates that Calhoun actually sees to challenge the voluntariness of his 2002 *nolo contendere* plea, which was used to enhance his federal sentence.

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method of obtaining collateral review. *See Commonwealth v. Descardes*, 136 A.3d 493, 497-98 (Pa. 2016) (explaining the PCRA subsumes the remedies of habeas corpus and coram nobis). Calhoun's challenge to the voluntariness of his guilty plea, *see* n.1, is clearly cognizable under the PCRA. Therefore, his characterization of his 2014 filing as a petition for coram nobis relief is incorrect. The PCRA court correctly treated the motion as a PCRA petition.

Next, we consider whether Calhoun's serial petition was timely filed. The timeliness of a post-conviction petition is jurisdictional. *Commonwealth v. Hernandez*, 79 A.3d 649, 651 (Pa. Super. 2013). Generally, a petition for relief under the PCRA, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final unless the petition alleges, and the petitioner proves, that an exception to the time for filing the petition, set forth at 42 Pa.C.S.A. sections 9545(b)(1)(i), (ii), and (iii), is met.²

² The exceptions to the timeliness requirement are:

- (i) the failure to raise the claim previously was the result of interference of government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States.
- (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
- (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court

42 Pa.C.S.A. § 9545. A PCRA petition invoking one of these statutory exceptions must "be filed within 60 days of the date the claims could have been presented." *See Hernandez*, 79 A.3d 651-52 (citations omitted); *see also* 42 Pa.C.S.A. § 9545(b)(2).³ Finally, exceptions to the PCRA's time bar must be pled in the petition, and may not be raised for the first time on appeal. *Commonwealth v. Burton*, 936 A.2d 521, 525 (Pa. Super. 2007); *see also* Pa.R.A.P. 302(a) (providing that issues not raised before the lower court are waived and cannot be raised for the first time on appeal).

Here, Calhoun's judgment of sentence became final on July 11, 2002, when the time for filing an appeal to this Court expired. *See* 42 Pa.C.S.A. § 9545(b)(3). Thus, Calhoun had until July 11, 2003, to file a timely PCRA petition. As he filed the petition at issue in 2014, it is untimely unless Calhoun has satisfied his burden of pleading and proving that one of the enumerated exceptions applies. *See Hernandez, supra.*

of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S.A. §§ 9545(b)(1)(i), (ii), and (iii).

³ Our legislature recently amended this section of the PCRA to provide petitioners one year to file a petition invoking a time-bar exception. *See* Act of 2018, October 24, P.L. 894, No. 146. This amendment does not apply to Calhoun's serial petition.

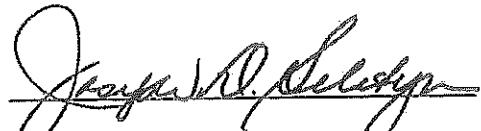
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Calhoun has failed to acknowledge, let alone establish, any exception to the PCRA's time bar. Instead, he argues that he is entitled to relief via a *coram nobis* petition, which provides an avenue for post-conviction relief outside the parameters of the PCRA. As noted above, well-settled case law holds otherwise. *See Descardes, supra.*

As such, the PCRA court correctly concluded that it lacked jurisdiction, and we affirm the court's order denying Calhoun post-conviction relief.⁴

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/29/19

⁴ Additionally, our review of the record supports the PCRA court's alternative conclusion that Calhoun is ineligible for relief under the PCRA because he did not establish that he is currently serving the sentence for which he entered his *nolo contendere* plea. *See* PCRA Court Opinion, 4/26/18, at 2; *Descardes, supra*.

From:

David Colhoun Reg. #59771-066
FDC Philadelphia, P.O. Box 562
Philadelphia, PA 19106

To:

Clerk of Courts, 2609 U.S. Courthouse
601 Market St., Philadelphia, PA 19106

RE: NEW MATTER

Dear Clerk of Courts,

Please find the enclosed petition for
writ of habeas corpus (protective) and file
it as a new matter to the U.S. District
Court for the Eastern District of Pennsylvania.
There are two (2) attachments to the
Petition which are enclosed. I have also
enclosed an application to proceed in forma
pauperis -- please process accordingly.

Thank you for your assistance,

Respectfully,

David Colhoun